Washington Nursing Home, Inc. *and* Kristal Sue Mays *and* Ramona G. Walter. Cases 9–CA–30476 and 9–CA–30477

May 30, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND COHEN

On December 8, 1993, Administrative Law Judge Michael O. Miller issued the attached decision. The Respondent filed exceptions and a supporting brief. Thereafter, the Respondent filed a motion to dismiss the consolidated complaint in this proceeding on the ground that the Supreme Court's decision in *NLRB v. Health Care & Retirement Corp. of America*, 114 S.Ct. 1778 (1994), warrants a finding that the alleged discriminatees are statutory supervisors. On August 5, 1994, the Board issued an Order remanding this proceeding to the judge for further consideration in light of *NLRB v. Health Care & Retirement Corp. of America*, supra. On November 16, 1994, Judge Miller issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a Request for Clarification and Motion in Opposition to Respondent's Request for Oral Argument.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the supplemental decision and the record[2] in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[3] and conclusions[4] and to adopt the original recommended Order as modified and set forth in full below.[5]

ORDER

The National Labor Relations Board adopts the original recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Washington Nursing Home, Inc., Cincinnati, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for supporting District 1199, the Health Care and Social Service Employees Union, or any other union.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Ramona G. Walter and Kristal Sue Mays full reinstatement to their former jobs or, if those jobs no longer exists, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Ramona G. Walter and Kristal Sue Mays whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

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[1] Contrary to the Respondent's brief on exceptions, the record shows that the General Counsel filed a supplemental brief to the judge following the Board's remand. Accordingly, we grant the General Counsel's motion to clarify the record to reflect the submission of this brief.

[2] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[3] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[4] After reviewing this proceeding in light of *NLRB v. Health Care & Retirement Corp. of America*, supra, and our recent decision in *Ten Broeck Commons*, 320 NLRB 806 (1996), we are satisifed that the judge properly found that alleged discriminatees Kristal Sue Mays and Ramona G. Walter were statutory employees while working as charge nurses at the Respondent's nursing home. Contrary to our dissenting colleague, we agree with the judge that the charge nurses' roles in assigning and directing the work of the Respondent's certified nurses aides (CNAs) does not constitute supervisory authority. The evidence establishes that, as in *Ten Broeck Commons*, supra, the CNAs' duties are repetitive and require little skill. Thus, we conclude that the assignment and direction the charge nurses give these employees does not involve the exercise of independent judgment. Their authority to decide when aides can take their breaks, to permit aides to leave early, to authorize overtime pay, to send home aides who are impaired by substance abuse, and to request that employees work additional shifts also is routine in nature. Additionally, we stress, as did the judge, that there is no showing that the verbal and written disciplinary warnings the charge nurses issue independently result in adverse action to the CNA without further review by higher authority. We further conclude that Mays and Walter were not supervisors even assuming, as the Sixth Circuit held in *NLRB v. Health Care & Retirement Corp. of America*, 987 F.2d 1256 (1993), that the General Counsel had the burden of showing that Mays and Walter were statutory employees to prove that the Respondent violated Sec. 8(a)(3) of the Act by discharging them. See also fn. 2 of the judge's supplemental decision where he similarly concluded that these employees did not possess any indicia of supervisory authority regardless of the allocation of the burden of proof. Accordingly, we deny the Respondent's motion to dismiss the consolidated complaint, which the Board had held in abeyance while remanding the proceeding to the judge.

[5] We shall modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Cincinnati, Ohio, copies of the attached notice marked ''Appendix.''[6] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 11, 1993.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

MEMBER COHEN, dissenting.

Contrary to my colleagues, and consistent with my dissenting opinions in *Providence Hospital*, 320 NLRB 717 (1996), and *Ten Broeck Commons*, 320 NLRB 806 (1996), I conclude that Charge Nurses Kristal Sue Mays and Ramona G. Walter are statutory supervisors. Accordingly, I find that their discharges were not in violation of the Act.

Section 2(11) of the Act makes clear that persons are supervisors if they exercise, or have the authority to exercise, at least one of the powers listed in that section, provided that they use independent judgment in doing so. Applying this test, I find that Mays and Walter are supervisors.

Initially, I find that Mays and Walter use independent judgment in assigning and directing the work of the Employer's certified nursing assistants (CNAs). In this regard, I note that the charge nurses tell the CNAs what chores they are to perform, and these instructions are based on the charge nurses' independent assessment of what needs to be done. Further, the charge nurses independently decide when aides can take their breaks. Charge nurses also independently decide to reassign aides to work on other floors or with different patients.

In addition, charge nurses can permit aides to leave early, can authorize overtime pay, and can request aides to come in and work a shift when there are insufficient aides on that shift.

The evidence further establishes that Mays and Walter have disciplinary authority sufficient to confer supervisory status. Charge nurses issue written counseling forms to aides for poor performance or misconduct, and those writeups have resulted in formal discipline of the CNA. Thus, I find that the charge nurses effectively recommend discipline.[1] Finally, the charge nurses have the authority to send aides home, without pay, if the aides are impaired by substance abuse.

Based on all of the above, or alternatively on any one the above, I find that Mays and Walter are supervisors under Section 2(11) of the Act. Accordingly, I would overrule the judge's finding that the Respondent violated Section 8(a)(3) and (1) when it discharged them.

[1] The fact that the decision maker reviews the recommendation is not inconsistent with an effective recommendation.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting District 1199, the Health Care and Social Service Employees Union or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Ramona G. Walter and Kristal Sue Mays full reinstatement to their former jobs or, if those jobs no longer exists, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Ramona G. Walter and Kristal Sue Mays whole for any loss of earnings and other benefits resulting from their discharges, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Ramona G. Walter and

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

Kristal Sue Mays, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

WASHINGTON NURSING HOME, INC.

Eric N. Taylor, Esq., for the General Counsel.
Ann L. Munson, Esq. and *Michael W. Hawkins, Esq. (Dinsmore & Shohl)*, for the Respondent.

DECISION

STATEMENT OF THE CASE

MICHAEL O. MILLER, Administrative Law Judge. This case was tried in Cincinnati, Ohio, on September 2, 21, and 22, 1993, on charges filed by Kristal Sue Mays and Ramona G. Walter, individuals (the Charging Parties or Mays and Walter), and a consolidated complaint issued by the Regional Director for Region 9 of the National Labor Relations Board (the Board), on April 26, 1993. The consolidated complaint alleges that Washington Nursing Home, Inc. (Respondent or WNH) violated Section 8(a)(3) and (1) of the National Labor Relations Act by discharging Mays and Walter because of their union activity. Respondent's timely filed answer asserts that Mays and Walter were statutory supervisors excluded from the Act's protections and denies that they were discharged because of their union activity.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. THE EMPLOYER'S BUSINESS AND THE UNION'S LABOR ORGANIZATION STATUS PRELIMINARY CONCLUSIONS OF LAW

The Respondent, a corporation, operates a skilled care nursing home at its facility in Cincinnati, Ohio. It annually derives gross revenues in excess of $100,000 and purchases goods and materials valued in excess of $5000 directly from points located outside the State of Ohio. The complaint alleges, the Respondent admits, and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The complaint alleges, Respondent admits, and I find and conclude that District 1199, the Health Care and Social Service Employees Union (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

WNH operates a skilled nursing care facility, serving up to 60 patients. The facility has four floors including the basement: the first and second floors contain the patient rooms with the most critical patients housed on the first floor and the more ambulatory patients residing on the second. The third floor is occupied by its offices and record storage areas.

Respondent employs licensed practical nurses (LPNs) and some registered nurses (RNs) as treatment and charge nurses. It also employs certified nurses aides (CNAs), kitchen/dietary employees, porters, and other housekeeping workers, employees involved in patient activities and social services and those who perform clerical tasks. The record contains no direct evidence of the employee complement. Respondent asserted that it has approximately 60 employees.

Over the employees described above are Jacob Lustig, Respondent's owner; Brenda Fette, administrator; Norma Shelton, director of nursing administration and assistant administrator; Sandra Dillhoff, director of nursing (DON); and Lynn Troxell, nurse systems manager. These are admitted supervisors. Additionally, there is Pamela Eiler, staffing coordinator, whose supervisory status is in dispute, and Ruby B. Jenkins, a senior employee with some supervisory attributes, whose title is tech supervisor.

The employees of WNH are not represented by any labor organization.

B. *The Issues*

The principal issues are:

1. Whether the charge nurses are supervisors or employees under the Act?

2. Whether Respondent discharged Ramona G. Walter and Kristal Sue Mays because of their union activities?

Subsidiary to the latter issue is whether Pamela Eiler is a statutory supervisor.

C. *The Status of the Charge Nurses*

1. In general

Section 2(11) of the Act defines a ''supervisor'' as:

> [A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

As the Board noted in *Phelps Community Medical Center*, 295 NLRB 486, 489, (1989):

> The types of supervisory authority are listed in the disjunctive and authority with regard to any one is sufficient to confer supervisory status. *Ohio Power Co. v. NLRB*, 176 F.2d 385 (6th Cir. 1949), cert. denied 338 U.S. 899 (1950). However, the exercise of authority must be in conjunction with independent judgment in the employer's interest. *NLRB v. City Yellow Cab Co.*, 344 F.2d 575 (6th Cir. 1965).

Nursing home patients, of course, require care around the clock and WNH operates on a three-shift basis: the charge nurses work 7 a.m. to 3:30 p.m. (the first shift); 3 to 11:30 p.m. (the second shift); and 11 p.m. to 7:30 a.m. (the third shift). On each floor for each shift there is a charge nurse, generally a licensed practical nurse (LPN) but sometimes a registered nurse (RN), and between two and six certified

nurses aides (CNA). There may also be one or more treatment nurses on duty.

The charge and treatment nurses provide skilled care to the patients, passing medications, giving injections, drawing blood, maintaining the tubes of patients with tracheotomies, and applying or changing dressings on wounds and sores. They perform their duties throughout the entire floor but have a desk at the nurses station where they maintain records of patient treatments and conditions and communicate with the patients' physicians about changes in the condition of or treatments for those patients. They make initial decisions regarding the need to remove a patient to a hospital setting and brief the incoming charge nurses at the start of each shift as to any changes in the condition of the patients. The charge nurses have keys to the narcotics lockers.

The CNAs, who have a lesser level of training than the LPNs, are involved with the patients on a more basic level. They maintain their physical cleanliness, bathing, changing, dressing, and shaving them. They feed their patients and position them in their beds, turning them as required to as to avoid sores or to facilitate breathing, following a schedule that is posted for their guidance. To a greater or lesser extent, they are directed or overseen in these duties by the charge nurses.

The charge nurses, treatment nurses, whether RNs or LPNs and CNAs are all hourly paid. The LPNs are more highly paid than the CNAs. All wear basically white or pastel clothing; and the female CNAs wear blue smocks over their clothes; and the LPNs do not.

In the instant case, there is no evidence that the charge nurses hire, lay off, recall, or promote other employees. At issue is whether they possess any of the other attributes of supervisory status. A determination that one is a supervisor under the Act removes that individual from under the ambit of the Act's protections; for that reason, the Board places the burden of proof of supervisory status on the party alleging that such status exists. *Health Care Corp.*, 306 NLRB 63 (1992), enf. denied 987 F.2d 1256 (6th Cir. 1993), cert. granted 114 S.Ct. 56 (1993).[1]

We turn to a consideration of the facts and case law applicable to such factors as are alleged to be present here.

2. Responsible direction or assignment of the CNAs

In determining whether, in the context of a health care institution, a more skilled employee's direction of one who is less skilled is a supervisor acting ''in the employer's interest'' the Board looks to see whether that direction is routine and whether ''it is primarily in connection with patient care, and not in the interest of the employer.'' *Phelps Community Medical Center*, supra at 490, quoting from *Beverly Manor Convalescent Center v. NLRB*, 727 F.2d 591, 593 (6th Cir. 1984).[2]

The Board has long applied this latter test to determine the supervisory status of both registered nurses, who are professional employees, and licensed practical nurses, who are technical employees.[3] Thus, in *Doctor's Hospital of Modesto*, 183 NLRB 950, 951 (1970), registered nurses who directed less-skilled employees in patient care, ensuring that such care was given, were held nonsupervisory inasmuch as their ''daily on-the-job duties and authority . . . are solely a product of their highly developed professional skills and do not, without more, constitute an exercise of statutory authority in the interest of their Employer.'' To hold otherwise, the Board and the courts have determined, would negate the Act's coverage of professional employees who must, in the course of their work, use independent judgment in giving direction to lesser-skilled employees. *Ohio Masonic Home*, 295 NLRB 390, 395 (1989), citing and quoting from *Beverly Manor Convalescent Centers*, 661 F.2d 1095, 1101 (6th Cir. 1981).

This test, moreover, is consistent with the legislative intent expressed in enacting the National Labor Relations Act Amendments of 1974, Pub. L. 93–360, 88 Stat. 395, which extended the Board's jurisdiction to nonprofit health care facilities. In S. Rep. No. 766, 93d Cong., 2d Sess. 6 (1974), it was stated:

> [T]he Board has carefully avoided applying the definition of ''supervisor'' to a health care professional who gives direction to other employees in the exercise of professional judgment, which direction is incidental [to] the professional's treatment of patients, and thus is not the exercise of supervisory authority in the interest of the employer.

See also H.R. Rep. No. 1051, 93d Cong., 2d Sess. 7 (1974), to the same effect. In both the House and the Senate, the Committees noted that they expected the Board to continue following this analytical mode. Ibid.

As Faye McIntosh, an LPN charge nurse, described her role, ''So much is so routine, it's kind of hard to remember exactly.'' The record reflects similar vagueness, with nearly

[1] Certiorari was granted as to the questions of whether ''a nurse's direction of less-skilled employees in the exercise of professional judgment and as an incident of patient care'' establishes that nurse as a statutory supervisor and ''[w]hether the Board permissibly requires the party who alleges that an employee is excluded from the Act's protections as a supervisor to bear the burden of proving the individual's supervisory status.'' While cognizant of the fact that this case arose within the confines of the Sixth Circuit, and that the Sixth Circuit Court of Appeals has repeatedly rejected the Board's position on both of these issues, most recently in the *Health Care Corp.* case cited above and now destined for resolution by the Supreme Court, I am duty bound to ''apply established Board precedent which the Supreme Court has not reversed.'' *Waco, Inc.*, 273 NLRB 746, 749 (1984); and *Iowa Beef Packers*, 144 NLRB 615, 616 (1963).

[2] Although the court had stated, in that decision, that if ''it is concluded that the independent professional judgment of a supervisory character is exercised primarily in connection with patient care, and not in the interest of the employer, then LPNs . . . would be properly included within the bargaining unit,'' that court has also concluded that what is in the interest of the patient and what is in the interest of the employer are ''not always mutually exclusive.'' See *Beverly California Corp. v. NLRB*, 970 F.2d 1548, 1553 (6th Cir. 1992), and *Beverly Enterprises v. NLRB*, 661 F.2d 1095, 1103 (6th Cir. 1981).

[3] In the context of this case and what appears to be current practice in the nursing home field, there is little to distinguish between registered nurses and licensed practical nurses insofar as the issue of the supervisory status of charge nurses is concerned. The RNs, of course, have a substantially higher level of training and education, and are able to render medical services and judgments which are prohibited to LPNs. Where the two work together, the RN will sometimes direct the patient care of the LPNs. However, in this nursing home and others similarly situated, both RNs and LPNs function as charge nurses with similar responsibilities vis-a-vis the aides.

as much testimony as to what people believe the charge nurses can or cannot do than as to what they do or have done.

In general, it is clear that the charge nurses are responsible for patient care and virtually everything they do is directed to that end. While the aides know their patients and know what is required of them on a day-to-day basis, if the charge nurse sees that a patient is in need of care, such as bathing, changing of sheets or clothing, or repositioning in bed, she will tell the CNA, whose job it is to perform these functions, to take care of it. If a patient's condition changes such that some additional or different care is required, the charge nurse will so inform the CNA. If a patient has an infectious condition, the charge nurse may also direct the aide to wear a mask or double glove when in contact with that patient. If a patient has soiled the floor, the charge nurse could call housekeeping for someone to clean up. A CNA might clean it up herself or ask a porter to do it.

The charge nurses have some responsibility for seeing that the floor is covered. Respondent's policy on the scheduling of breaks requires that aides and porters must sign out at the nurses stations when going on their breaks and must advise their ''supervisor'' when leaving their work areas. Who that ''supervisor'' is, the policy does not say. Shelton testified that the intended reference is to the charge nurse. In practice, the CNAs tell the charge nurse when they are taking breaks; it is unclear whether they actually sign in or out from those breaks.[4] The charge nurse may ask an aide to delay taking a break where the floor would not be properly covered or an emergency exists. Similarly, Respondent's policy on ''Leaving Premises While on Duty'' prohibits employees from leaving the home while on duty and requires that any exceptions be cleared with the ''supervisor and/or administrator.'' The aides and the charge nurses do leave the premises on their lunch hours. The aides will tell the charge nurse that they are leaving and one charge nurse will tell the other if she were going to be off the premises. If an emergency arose requiring a CNA to leave, the charge nurse would allow the aide to do so. When staffing conditions require it, the charge nurse may direct an aide to work on the other floor or with different patients.

Sometimes, urgent patient care needs preclude the charge nurse from completing her paperwork by the end of her shift. When that happens, according to Mays, she can decide to stay over, earning overtime, in order to complete it. When a CNA calls and tells the charge nurse that she will not be coming in to work a scheduled shift, the credible evidence indicates that the charge nurse, even a charge nurse hired as a temporary from a nurses' agency, can ask another aide to stay over until a replacement arrives or for an entire shift. The charge nurse will initial that employee's timecard to show that the extra hours were authorized. However, there is no evidence that a charge nurse can require that an aide remain beyond the end of her shift. It also appears that a charge nurse can call an aide to ask if that aide wants to come in for the shift. There is no set order in which the aides are to be called. If the tech ''supervisor,'' Ruby B. Jenkins (known as Miss Ruby), is present, the charge nurse may get a number from her. The up-to-date list of the aides' phone numbers is maintained at Miss Ruby's desk and, in her absence, a charge nurse may get the numbers from that source.[5] Where an aide has made a mistake in punching in or out, the charge nurse may sign the corrected timecard.

The authority and responsibilities of Respondent's LPN charge nurses are typical of the authority and responsibilities of similar employees found by the Board in numerous cases to be insufficient to establish supervisory status. Thus, in *Riverchase Health Care Center*, 304 NLRB 861 (1991), the Board found that the assignment and direction of the work of the nurses aides, following doctors' orders and standard nursing practices, as here, was both routine and primarily in connection with patient care. There, the Board also found that the authority to call in replacements from a list of approved aides, request, but not require, aides to work overtime, or to transfer aides to different wings of the facility where circumstances required, to initial timecards, and verify attendance when an aide neglected to punch the timeclock, or to request aides to postpone or reschedule breaks all in order to ensure adequate staff coverage, involved only the exercise of routine judgment and did not align the charge nurses with the employer. See also *Health Care Corp*., supra; *Phelps Community Medical Center*, supra; *Waverly-Cedar Falls Health Care*, 297 NLRB 390 (1989); and *Beverly Manor Convalescent Centers*, 275 NLRB 943 (1985). Indeed, as the Board noted in the latter case at 947:

> The authority of the LPNs . . . would be insufficient in the industrial setting to render them supervisors. As in the case of leaders in manufacturing plants, the LPNs . . . have no authority to fire, hire, or effectively to recommend such actions; they do not grant vacations or leave time. At most, they give general direction, train employees, and seek to maintain product quality control.

Moreover, the authority to work overtime, under clearly defined circumstances, without getting the approval of her own supervisor, does not indicate any supervisory authority over any other employees.

Based on the foregoing, I am compelled to conclude that the LPNs' role in assigning and directing the work of the CNAs falls short of establishing that they responsibly direct the work of those aides with the exercise of independent judgment, whether that direction is considered to be in the employer's interest or that of the patients. Clearly, no independent judgment is required to determine that a patient's clothing or bed linens are wet and in need of changing or that a patient should be turned in the bed pursuant to a posted schedule. This is the kind of direction which comprises most of the charge nurses' role with respect to the aides.

[4] Both Mays and Walter denied that there were any sign-in sheets. CNA Wynola Mozee testified that they were ''supposed'' to sign a chart at the nurse's station and had to tell the charge nurse when they were leaving the floor. No examples of such sign-in sheets or charts were placed in evidence.

[5] Walter testified that she had never called an aide to come in to work and that she had been told by Shelton and Troxell that she had no authority to do so. It was her testimony that she had to call the scheduling supervisor, Pam Eiler, to secure a replacement aide and that she had done so as late as 11 p.m. to report that an agency nurse had failed to show up. I would conclude that there was no fixed practice established on this record.

3. Authority to reward, promote, discipline, or discharge aides

The authority of the charge nurses to reward, promote, discipline, or discharge the CNAs is limited. The CNAs are evaluated at the conclusion of their probationary periods and annually thereafter. Those evaluations are conducted by Dillhoff and Shelton. Respondent's written policies give no role to the charge nurses in that evaluation procedure. Shelton claimed that she sometimes sought input about a CNA from either the charge nurse or from other employees; her evaluation might change based on a charge nurse's evaluation, she stated.

Walter has rewarded the CNAs on her floor and shift by buying pizza for everyone, at her own expense. Mays testified that, while she is not required to do so, she might tell either Troxell or Dillhoff if she felt that a CNA was doing a particularly good job. If that aide was not performing properly, Mays said, she would ask the aide if she was having a problem that day. Mays has not had a situation where an aide continually failed to do her job. If such a situation arose, she would report it to Miss Ruby, Mays said. If this failed to achieve the necessary improvement, she would then talk to the director of nursing.

There are instances when a charge nurse will report or writeup an aide. All instances of patient abuse are reported by anyone who observes them, as required by state law and the Employer's policy. The record also contains some examples of written employee counseling or disciplinary reports.

Thus, on April 17, 1988, LPN M. Williams issued a written warning to an aide for failing to obey orders respecting the use of the telephone. On March 23, 1991, LPN Hollingsworth issued a written warning to an aide who refused her order to clean a bedside commode. On October 10, 1991, an RN charge nurse wrote an employee counseling form on an aide who had failed to follow her instructions and had been ''disrespectful . . . with charge nurse.'' That counseling form stated that the nurse had told the aide to clock out and leave the facility. The employee had ignored this order and the nurse had to secure the assistance of Miss Ruby to enforce her order. On March 10, 1992, RN Kathy Skidmore issued a counseling form to an aide for excessively watching TV and failing to attend to his duties. A plan of action, instructing the employee to watch TV only on his breaks and to follow the routine listed on the schedule, was written out on an informal note pad and signed by the employee. That same employee and another aide were issued counseling forms or verbal warnings by LPN Valerie Evans on October 13, 1992, for interfering with each other's work. Those writeups resulted in Shelton discussing the problem with the employees and issuing them written warnings.

Similarly, on December 4, 1992, Shelton counseled an aide about his work performance after two charge nurses, Faye McIntosh and Lynn Troxell, reported that he was failing to attend to his scheduled duties.[6]

Other than as described above, the record does not reflect what effect the charge nurses' counseling forms or warnings had on the wages, tenure, or other conditions of the aides' employment. Shelton testified that she is the one who issues employee discipline, although she claimed in general terms that a charge nurse could do so as well.

In several instances, employees impaired by substance abuse have been sent home by a charge nurse. In one instance, Mays observed an aide in an apparent state of intoxication. She reported it to Fette, Fette spoke with the employee and told him that it would be better if he went home. Fette then drove him home. In another instance, an aide sent home for the day for the same reason by Charge Nurse Ruby A. Jenkins was apparently not given any further discipline.

Nothing in any of the above rises to the level required to establish supervisory status. The charge nurses have no greater role in the evaluation of the aides than does any other employee, including other aides. They may be asked about an aide's performance but are not given any express role in the evaluation process. In several recent cases where the charge nurses had significantly greater roles with respect to evaluations, the Board nonetheless found supervisory status to be absent. In *Phelps Community Medical Center*, supra, the director of nursing delegated some of the evaluations of day-shift aides to the LPNs and had the evening and night-shift LPNs fill out evaluations on the aides who worked with them. Those evaluations rated the aides in various aspects of their performance and, in some cases, indicated whether the LPN recommended continued employment. The Board, noting that there was no evidence as to the weight or effect of such recommendations and evaluations, held that their role in those evaluations did not establish that they possessed or exercised supervisory authority. It noted that ''[t]he authority simply to evaluate employees without more is insufficient to find supervisory status,'' citing *Passavant Health Center*, 284 NLRB 887, 891 (1987), and *Geriatrics, Inc.*, 239 NLRB 287 (1978). See also *Waverly-Cedar Falls Health Care*, supra, and *Ohio Masonic Home*, supra, where the LPNs evaluated both probationary and nonprobationary employees, assessing their performance on a number of job-related categories. Those evaluations, however, did not recommend any personnel action and there was no showing that any employee's job status had been affected by such an evaluation.

Similarly, the role of the charge nurses in issuing verbal and written warnings or counseling forms, which go into an employee's personnel file but do not independently result in any adverse action, does not evidence supervisory status. In *Ohio Masonic Home*, supra, the authority of the charge nurses to issue warnings was similar to the authority of Respondent's charge nurses, as was the effect of those warnings. The Board stated that ''[t]he mere authority to issue verbal reprimands of the kind involved here is too minor a disciplinary function to constitute supervisory authority. . . . Likewise, the mere factual reporting of oral reprimands and the issuing of written warnings that do not automatically affect job status or tenure do not constitute supervisory authority.'' (295 NLRB at 394.)

In both *Ohio Masonic Home* and *Phelps*, the charge nurses had limited authority to clock an aide out when that aide's

[6] The record also contains warnings or records of counseling signed by Troxell, who was the nursing systems manager and an admitted supervisor, in addition to being an LPN and by Shelton, who was an LPN and director of nursing administration. One counseling form, dated August 10, 1992, issued by Troxell, was signed by Miss Ruby, as ''tech sup.'' after the director of nursing spoke with the aide and established a routine whereby Miss Ruby would give her instructions on the importance of making her rounds.

continued presence posed a danger to the patients either because of his or her refusal to obey patient care instructions or because of substance abuse related impairment. In both cases, the Board held that the limited exercise of such authority, particularly when it is limited to ''flagrant violation[s] of common working conditions, such as being drunk, is insufficient by itself to establish supervisory status.'' The authority of Respondent's charge nurses to send an aide home was no greater than that of the LPNs in the cited cases. Moreover, the evidence indicates that such authority was not always exercised independently and without reference to higher authority.

4. Other factors

As noted above, the charge nurses wear somewhat different clothing from the CNAs. They are more highly paid although all are paid on an hourly basis.

The charge nurse job description places the responsibility for the nursing care of all patients on an assigned unit on the charge nurse. It also provides that the charge nurse is ''[r]esponsible for supervision of all nursing personnel . . . checking that their jobs are done . . . .'' It further provides that the charge nurse ''[a]ttempts to solve minor employee problems, refers problems with nursing technicians [CNAs] to their immediate supervisor first, and to the director of nursing if necessary.'' Under that job description, the ''primary charge nurse'' is in charge of the facility in the absence of the director of nursing and acts ''as supervisor of all LPNs in patient care emergency situations.''[7] In at least one instance, Mays called the police when there was a suspected break-in. There was no evidence of grievance adjustment by the charge nurses other than possibly separating two aides who might be experiencing difficulties working together.

The managerial hierarchy is present at the nursing home during the first shift, with some of them coming in before that shift begins or staying several hours into the second shift. For most of the hours of the second and third shifts, the most senior persons present at the facility are the charge nurses. However, an RN, either the director of nursing or another, is either on duty or on call at all times.

In agreeing to the terms of an election among Respondent's employees, the Union acceded to the Employer's position and excluded the LPNs from the bargaining unit. Miss Ruby was included as an eligible voter.

There is nothing in these additional factors which warrants a contrary conclusion with respect to the supervisory status of the charge nurses. Neither a distinction in their dress nor a higher rate of pay necessarily indicates supervisory status. The fact that they are the highest-ranking individuals on the site during most of the second and third shifts is some evidence in that direction. It is negated, however, by the fact that Respondent's policy manuals give detailed instructions covering most situations. Moreover, during those hours, admitted supervisors are on call and immediately available by telephone. *Waverly-Cedar Falls Health Care*, supra; *Phelps Community Medical Center*, supra. I can accord little weight to the Union's agreement to exclude the charge nurses from the bargaining unit. Given the adverse rulings of the Court of Appeals in the Sixth Circuit, any other course of action would have likely caused considerable delay and uncertainty to any election and/or certification.

D. *The Discharges*

1. The facts

Kristal Mays began working for WNH in March 1992. For a period of time, she worked as a charge nurse on an as-needed basis. Starting in August of that year, she worked on the day shift as the treatment nurse in place of her sister, Lynn Troxell. From mid-November 1992 until her discharge, she was the charge nurse on the 3 to 11:30 p.m. shift on the second floor. Ramona Walter, an LPN since 1990, began working for WNH as the second-shift charge nurse for the first floor in mid-January 1993.[8]

In early March 1993, Walter contacted David Regan, the Union's Ohio area director; she arranged to meet with him at her home on the morning of March 8. At that meeting, Mays, Walter, and Regan discussed the unionization of Respondent's nurses and scheduled a meeting for about midnight of that night for him to meet with other employees at a restaurant near the nursing home.

Walter and Mays worked their shift on March 8. During breaktimes, they both testified, they told the nurses aides about the union meeting. After work, about 15 or 16 employees, including some who had been telephoned by Walter or Mays, attended the organizational meeting.

Yolanda ''Bonnie'' Champion is a cook at WNH. She works in the kitchen until 6 p.m. and then as a CNA on the first floor for the balance of the second shift. Shortly after 6 p.m., she claimed, she saw Mays ''heading towards out the door.'' Later, when she had occasion to go looking for Walter to report on a patient's condition, she observed Walter, Mays, and a man later identified to her as Walter's brother, in an office on the second floor. At that same time, she saw RN Ruby A. Jenkins ''running around'' in a ''frantic mood'' seeking the first floor nurse and complaining that a patient's tracheotomy mist bottle had been allowed to run dry.

RN Jenkins testified that she had come to the home to see her grandmother, Miss Ruby, and heard the sound made by an empty mist bottle coming from a patient's room on the first floor. She checked, found the bottle completely empty, filled it, and then went looking for the nurse responsible for the patient. She claimed that she found Walter in the office on the second floor, behind a locked door.

During the course of the evening, according to Champion, Walter asked her how she felt about a union and repeatedly asked her to go to a meeting. Walter purportedly told her that Mays wanted to talk to her and some of the other CNAs about a union. About 9 p.m., she went to the TV room on the second floor. Walter, Mays, and all six CNAs were present, she claimed. She remained there about 5 minutes and returned to her floor when she realized that there were no nurses covering the floors. Walter returned to the first floor about 30 minutes later, she asserted.

Sometime after 10 p.m., Champion again saw Mays going ''out towards the door,'' wearing her coat.

The next day, Champion told Miss Ruby what she believed had happened on the prior shift, specifically mention-

[7] Respondent's policies do not define who is the ''primary charge nurse'' and that does not appear to be a designation in actual usage in the nursing home.

[8] All dates hereinafter are 1993 unless otherwise specified.

ing that the meeting was for the purpose of discussing union organization. Miss Ruby told a charge nurse, Faye McIntosh, and McIntosh told Shelton or Brenda Fette. Champion and Miss Ruby were then brought in to a meeting with Lustig, Fette, and Shelton. Champion repeated what she had told Miss Ruby, including that the meeting was for the purpose of discussing unionization.

Shelton testified that McIntosh had told her that Champion had reported being pulled off the floor to attend a meeting. She then spoke with Champion who repeated what she had told Miss Ruby. Champion was brought in to a meeting with Lustig, Fette, and Miss Ruby. According to Shelton, Champion told them that Mays had left the building twice, that she did so all the time and spent most of her time on the first floor, and that ''they had pulled all these people off the floor.'' Miss Ruby told them about the mist bottle.

Initially, Shelton said that she was not sure whether Champion had told her that the meeting was about the Union, claiming that her memory was not very good. When questioned as to whether or not she asked Champion about the purpose of the meeting, she replied, ''Why would I ask her?'' Subsequently, she acknowledged that she may have asked what kind of a meeting it was and that she may have been told that it was a union meeting. Again, she claimed that its purpose was not relevant to her. Her testimony with regard to this aspect of the conversations with Champion was both improbable and incredible.[9]

After Champion told the management what she believed had happened on March 8, Sandra Dillhoff was called into the meeting. They reviewed what Champion had told them and made an immediate decision to terminate both Mays and Walter. No further investigation was conducted and no other employees were questioned.

According to both Walter and Mays, nothing untoward occurred during their shift. During the evening, Walter's brother came in with his lunch and they ate together in Troxell's office on the second floor.[10] Mays was in and out of that office while they ate, making coffee. After 10 p.m., Mays left the facility to pick up David Hodge, the third-shift charge nurse for the second floor, who had called in to say that he had no way of getting to work. Neither the use of Troxell's office nor leaving the facility on one's break or for nursing home business was unusual or impermissible, they credibly testified. Even though Mays considered picking Hodge up to be nursing home business, she did so on her own time, punching out at 10:10 p.m. and back in at 10:28 p.m. She told Walter that she was leaving and why and gave Walter her keys. Mays denied that she had left the facility earlier in the evening and both denied that they held any meeting with the CNAs during the shift or met with them as a group. There were times during that night when Walter and/or Mays were in the TV room with one or two CNAs when they may have mentioned the Union and the meeting scheduled for that night. Champion had approached Walter to ask about the meeting scheduled for later that night and Walter referred her to Mays. Mays testified that Champion came up to her in the TV room at about 9 p.m. and asked about that meeting. At the time that she did so, two other CNAs were in the TV room, on their breaks, and Walter came in to return some medication which she had earlier borrowed from Mays' stock. Walter acknowledged that a patient's mist bottle had run low and that RN Jenkins had filled it and then brought it to her attention; she denied that it had run completely dry or that an empty mist bottle would have jeopardized the patient's life. The mist bottle was intended to keep the patient's secretions moist.

Respondent did not seek to confirm Champion's observations until it began to prepare for this hearing. About a week before hearing, its counsel questioned CNA Wynola Mozee. Mozee worked a double shift, from 3 p.m. March 8 to 7 a.m. the following morning. As she recalled the events of that night, Mays told her to meet in the TV room after she had finished passing the supper trays in order to discuss forming a union. The meeting began between 8:30 and 9 p.m. On direct examination, she testified that it lasted about 45 minutes to 1 hour. On cross-examination, she claimed that it lasted for 1-1/2 hours. She left before 10 p.m. in order to complete her rounds before 11 p.m. At that meeting, she asserted, were what she believed were all of the CNAs and both Walter and Mays. She was unable to say whether anyone had been left on the first floor; no one was left making rounds or manning the nurses station on the second floor, she claimed. However, much of the second floor could be seen from the TV room.

Respondent's April 2 statement of position, as well as the testimony of Shelton and others, indicates that Miss Ruby was present on the first floor until at least 8 p.m. Miss Ruby was not called as a witness in this proceeding.

The question of whether or not there was a meeting of all the CNAs during the second shift on March 8 is not easy of resolution. All of the witnesses impressed me as hard working and deeply concerned for the welfare of their patients. In particular, Walter, Mays, and Mozee testified with credible demeanor. I was less impressed by Champion, who appeared to be shading her testimony so as to put Walter and Mays in the worst possible light, both as to their alleged supervisory status and as to the events of March 8, and Shelton, whose claims of disinterest in the subject of the meeting and her lapse of memory as to any mention of union activity were patently incredible.

After careful consideration, I am compelled to conclude that there was no meeting such as was reported by Champion or later described by Mozee. Walter and Mays may have been briefly in the TV room at the same time, with several of the aides also present. They admittedly discussed the meeting planned for that night with the aides on their breaks. Given that such a meeting with a representative of the Union was already scheduled, there would have been little reason for Walter and Mays to hold a lengthy meeting with the CNAs. Both Champion, who only claimed to have remained in the ''meeting'' for 5 minutes, and Mozee, who clearly exaggerated the duration of what she perceived to be a meeting of all the aides, were, I believe, mistaken in their perceptions. I must also conclude that there was no evidence that Mays left the facility more than once during that shift. Champion did not see her leave in the early part of the night, she only saw her ''heading towards out the door.'' As to the matter of the mist bottle, I believe that RN Jenkins did find the bottle empty, or nearly so. The problem was quickly corrected, with no detriment to the patient alleged, and was

[9] Respondent's April 2 statement of position acknowledges that Miss Ruby told Fette that the purpose of the alleged meeting was ''to discuss a union.''

[10] Walter's brother, Homer Mann, is a representative for another union. He may have been wearing a jacket bearing a Teamsters logo.

brought to Walter's attention. Given the varied duties of the charge nurses, this would appear to be something that would happen from time to time, even when a nurse plans to refill the bottle at the time when she anticipates it will be nearly empty, as Walter had planned to do.

When Walter and Mays arrived at the home for the start of their shifts on March 9, they found that Walter's timecard had been pulled. The day-shift charge nurse told Walter that she was to go to the third-floor administrative offices. Mays accompanied her. Dillhoff took Walter into the office and told her that she was still in her 90-day probationary period and that they had decided not to retain her. Walter asked for an explanation and insisted that she was a good nurse. Dillhoff acknowledged the quality of her nursing skills but insisted that Walter was ''just not meeting our expectations.'' When asked by Walter, she said that there had been a couple of complaints about her work; she refused to give Walter any details.[11]

After Walter was terminated, Mays was brought into Dillhoff's office by Shelton. Shelton asked her whether she had left the facility the prior night. Mays acknowledged that she had. Shelton accused her of leaving twice and asked her if she had punched out. Mays insisted that she left only once. She left the office to get her timecard, returned, and showed that card to Shelton. As Mays recalled it, Shelton insisted that she had left twice, claimed that she had a witness, and told Mays that she was fired. Mays asked if she was being fired for leaving the building twice when she only left once and was told, ''That and a bunch of other stuff.''

Shelton's version is even more abrupt. She contended that she told Mays that Mays was owed no explanation but asked her if she had left the facility. Mays admitted that she had done so, clocking in and out, and produced her timecard to prove it. Shelton testified that she was ''kind of upset, and I didn't explain anything to her. I just said, You're fired. And she did not ask for any explanation. I didn't offer any. I didn't feel like I owed her one.''

After their discharges, Walter and Mays returned to Walter's home. From there, they called Lynn Troxell who, in addition to being a supervisor and sister of Mays, was a classmate and friend of Walter's. With Mays listening in on the conversation, Walter told Troxell that they had been fired for what they believed was their union activity. Troxell expressed disbelief that WNH would have fired them[12] and suggested that she get Pam Eiler on her three-way calling line while Walter and Mays listened in. Troxell told Walter and Mays to remain silent and called Eiler. According to both Walter and Mays, Troxell told Eiler that the two had been fired and believed it was because of their union activity. Eiler replied, ''Yes, I know it was for union activity, but we are not supposed to talk about that.''

Eiler did not participate in the decision to discharge these employees. She learned of it when she was asked to secure their replacements. She recalled getting a telephone call from Troxell wherein Troxell asked if she knew why they had been fired. She testified that she told Troxell that she did not know the reason. Troxell was not called as a witness in this proceeding. I credit the mutually corroborative recollections of Walter and Mays.[13]

2. The status of Pamela Eiler

While Walter testified that she knew Eiler as the ''scheduling supervisor,'' Eiler described her title as staffing and medical records coordinator. She schedules the shifts of all of the RNs and LPNs. When one of the RNs or LPNs calls in as unable to work, Eiler, after checking with Fette, Dillhoff, or Shelton to authorize the overtime,[14] asks another staff nurse to work the shift. She follows no predetermined list or roster in securing a replacement. If the first nurse she asks is unwilling to work, she keeps asking others until a replacement is found.

It is the Respondent's policy to favor the use of staff nurses rather than going outside to an agency for replacements. A staff nurse who works a second shift within 24 hours receives an additional $5 per hour. If Eiler cannot find a staff nurse to fill in, she can call an agency, but only after first checking with one of her superiors. She has rejected certain agency nurses, again however only with the approval of one of those superiors. Other than scheduling them to work, Eiler does not oversee, direct, or evaluate the work of the charge nurses.

Eiler had begin her employment as a CNA. She worked in the activity department for a period and then began to work in medical records before assuming the scheduling function. She still works as a CNA on occasion. Eiler shares a desk with Norma Shelton. According to Walter, Eiler attends weekly meetings which are attended by Troxell and Shelton. Brenda Fette, Ruby Jenkins, the charge nurses, and the activities director sometimes also attend those meetings.

Based on the foregoing, I am compelled to conclude that the General Counsel has failed to sustain his burden of establishing that Pamela Eiler is a statutory supervisor.[15] Her function with respect to the scheduling of nurses is essentially clerical and routine, with authorization required whenever overtime or the selection or rejection of an agency nurse is involved. *Riverchase Health Care Center*, supra. Accordingly, I must find that Respondent is not bound by the purported admissions of Pam Eiler.

[11] Given Walter's recording of this conversation, Mays' corroboration of Walter, Dillhoff's unsure and unconvincing assertion that she questioned Walter about abandoning her post, as well as her unconvincing claim that she was unconcerned about and did not recall whether she knew of the union activity when the employees were discharged, I credit Walter and find that Dillhoff did not question her about the events of March 8 or give her any reason for the termination.

[12] Walter recalled Troxell saying, in response to her claim that they had been fired for their union activity, that she had ''heard something to that effect.'' Mays did not corroborate Walter's recollection in this regard.

[13] In a subsequent conversation between Eiler and Walter, which Eiler does not dispute, Eiler did not contradict Walter when Walter repeatedly asserted that she had been discharged for her union activity.

[14] Eiler so testified and the Charging Parties' observations to the contrary would not have included knowledge of any instructions she had received from one of the acknowledged supervisors.

[15] *Adco Electric*, 307 NLRB 1113 fn. 1 (1992); and *Health Care Corp*., supra.

3. Analysis of Respondent's motivation and conclusions

Wright Line, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), provides the analytical mode for resolving discrimination cases turning on the employer's motivation. Under that test, the General Counsel must first:

> make a prima facie showing sufficient to support the inference that protected conduct was a ''motivating factor'' in the employer's decision. Once accomplished, the burden shifts to the employer to demonstrate that the same action would have taken place notwithstanding the protected conduct. It is also well settled, however, that when a respondent's stated motives for its actions are found to be false, the circumstances may warrant an inference that the true motive is one that the respondent desires to conceal. The motive may be inferred from the total circumstances proved. Under certain circumstances, the Board will infer animus in the absence of direct evidence. That finding may be inferred from the record as a whole. [Citations omitted.]

Fluor Daniel, Inc., 304 NLRB 970 (1991).

A prima facie case is made out where the General Counsel establishes union activity, employer knowledge, animus, and adverse action taken against those involved or suspected of involvement which has the effect of encouraging or discouraging union activity. *Farmer Bros. Co*., 303 NLRB 638, 649 (1991). Inferences of animus and discriminatory motivation may be warranted under all the circumstances of a case; even without direct evidence. Evidence of suspicious timing, false reasons given in defense, and the failure to adequately investigate alleged misconduct all support such inferences. *Adco Electric*, 307 NLRB 1113, 1128 (1990), enfd. 6 F.3d 1110 (5th Cir. 1993); *Electronic Data Systems Corp*., 305 NLRB 219 (1991); *Visador Co*., 303 NLRB 1039, 1044 (1991); *Associacion Hospital del Maestro*, 291 NLRB 198, 204 (1988); and *Clinton Food 4 Less*, 288 NLRB 597, 598 (1988).

I am satisfied that the General Counsel has established the requisite prima facie case on the record before me. Walter and Mays had initiated the union activity, management was immediately made aware of that activity and they were discharged immediately on management's acquisition of that knowledge. It cannot be denied that the discharge of the two initiators of the union activity would tend to discourage continued union activity. *Stoody Co*., 312 NLRB 1175, 1183–1184 (1993).

While there is no direct evidence of union animus in this record, the record as a whole clearly warrants the inference that such animus motivated the discharges. In particular, I note that Respondent invoked the ultimate industrial weapon, discharge, against two employees whom it had placed in positions of responsibility based solely on the word of one lower-ranking worker. Respondent failed to question other employees about the alleged acts of misconduct and decided on the discharges without even talking to its two charge nurses. Even after it decided to discharge them, it neither confronted the dischargees with the most essential of the accusations made against them nor asked them what they had done or what had taken place. As the Board stated in *Clinton Food 4 Less*, supra at 598:

> An employer's failure to adequately investigate an employee's alleged misconduct has been found to be an indication of discriminatory intent, and we consider the Respondent's failure to investigate [the complaining employee's] complaint as an important factor in determining the reason it discharged [the discriminatee].

Thus, when she was discharged, Walter was merely told that she was a probationary employee whom they had decided not to retain. Even though she asked for an explanation, no reason beyond a statement that she was ''not meeting their expectations'' was ever given her. Similarly, after the decision to discharge her was made, Mays was accused of having twice left the facility during her shift. She admitted that she had left, but just once, during the shift, a common and tolerated occurrence. Respondent gave her claim no consideration even though the contrary evidence it had was ambiguous at best; Champion did not claim that she saw Mays actually leaving the building around 6 p.m., she had merely said that she had seen Mays ''on the first floor heading towards out the door.'' Unlike her description of Mays leaving around 10 p.m., when she described Mays as being dressed to go outside, Champion did not testify that Mays was wearing her coat at about 6 p.m. or that she actually saw her leave. Most significantly, neither Walter nor Mays was accused of, or questioned about, the meeting they allegedly held with all of the CNAs during that shift.

Further indicative of Respondent's animus and unlawful motivation is its patently incredible efforts to deny knowledge of, or concern about, the union activity. That concern is reflected in the alacrity with which it acted on sketchy and scant information and by the fact that, when it received that information, it called the alleged witness in to a meeting with virtually all of its top management.

The foregoing evidence forcefully shifts the burden to the Respondent to show that it would have discharged Mays and Walter even in the absence of their union activity. I have rejected its claims concerning both the alleged meeting[16] and Mays alleged leaving the building more than once during the course of her shift. Those claims, having been found to be pretextual, fail to meet Respondent's burden. *Farm Fresh, Inc*., 301 NLRB 907 (1991). Its other claims, that Walter and Mays were behind a locked door in Troxell's office, that Walter allowed a mist bottle to run dry, or that the first floor door was found to be unlocked when Champion went back downstairs, do not satisfy that burden. Respondent did not investigate these incidents and neither confronted nor questioned Walter and Mays concerning them. Moreover, it failed to show that the mist bottle incident was unusual or that it jeopardized a patient such that it would have warranted any level of discipline, let alone discharge.

Based on the foregoing, I find that Respondent was motivated to discharge Ramona Walter and Kristal Sue Mays by their union activity. I conclude that those discharges violated Section 8(a)(3) and (1) of the Act.

[16] Even if there had been such a meeting, Respondent's failure to question Walter and Mays about it or to investigate further before deciding to discharge them, and its failure to even mention it in their discharge interviews, would establish that it was not the existence of the meeting but the fact that it concerned union organization that motivated the discharges.

CONCLUSION OF LAW

By discharging Ramona G. Walter and Kristal Sue Mays because they engaged in union or other protected concerted activity, and in order to discourage employees from engaging in such activities, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged employees, it must offer them reinstatement and make them whole for any loss of earnings and other benefits they suffered, computed on a quarterly basis from date of their discharges to the date of proper offers of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

MICHAEL O. MILLER, Administrative Law Judge. I issued my initial decision and recommended Order in this matter on December 8, 1993 finding, inter alia, that Kristal Sue Mays and Ramona G. Walter, licensed practical nurses who were employed as charge nurses, were employees, entitled to the Act's protection, and not statutory supervisors within the meaning of Section 2(11) of the Act. On August 5, 1994, the matter was remanded to me ''for further consideration in light of *NLRB v. Health Care & Retirement Corp. of America*,'' 114 S.Ct. 1778, which issued on May 23, 1994 (*Health Care*).

For ease of understanding, the following includes a reiteration of my factual findings, to the extent relevant, to which I adhere in this supplemental decision.

A. *Background*

WNH operates a skilled nursing care facility, serving up to 60 patients. The facility has four floors including the basement; the first and second floors contain the patient rooms with the most critical patients housed on the first floor and the more ambulatory patients residing on the second. The third floor is occupied by its offices and record storage areas.

Respondent employs licensed practical nurses (LPNs) and some registered nurses (RNs) as treatment and charge nurses. It also employs certified nurses aides (CNAs), kitchen/dietary employees, porters, and other housekeeping workers, employees involved in patient activities and social services, and those who perform clerical tasks. Respondent has approximately 60 employees.

Over the employees described above are Jacob Lustig, Respondent's owner; Brenda Fette, administrator; Norma Shelton, director of nursing administration and assistant administrator; Sandra Dillhoff, director of nursing (DON); and Lynn Troxell, nurse systems manager. These are admitted supervisors. Additionally, there is Pamela Eiler, staffing coordinator (who, I concluded, lacked supervisory status), and Ruby B. Jenkins, a senior employee with some supervisory attributes, whose title is tech supervisor.

B. *The Status of the Charge Nurses*

1. In general

Nursing home patients, of course, require care around the clock and WNH operates on a three-shift basis; the charge nurses work 7 a.m. to 3:30 p.m. (the first shift), 3 to 11:30 p.m. (the second shift), and 11 p.m. to 7:30 a.m. (the third shift). On each floor for each shift, there is a charge nurse, who is generally a licensed practical nurse (LPN) but is sometimes a registered nurse (RN), and between two and six certified nurses aides (CNA). There may also be one or more treatment nurses on duty.

The charge and treatment nurses provide skilled care to the patients, passing medications, giving injections, drawing blood, maintaining the tubes of patients with tracheotomies, and applying or changing dressings on wounds and sores. They perform their duties throughout the entire floor but have a desk at the nurses station where they maintain records of patient treatments and conditions and communicate with the patients' physicians about changes in the condition of or treatments for those patients. They make initial decisions regarding the need to remove a patient to a hospital setting and brief the incoming charge nurses at the start of each shift as to any changes in the condition of the patients. The charge nurses have keys to the narcotics lockers.

The CNAs, who have a lesser level of training than the LPNs, are involved with the patients on a more basic level. They maintain their physical cleanliness, bathing, changing, dressing, and shaving them. They feed their patients and position them in their beds, turning them as required so as to avoid sores or to facilitate breathing, following a schedule that is posted for their guidance. To a greater or lesser extent, they are directed or overseen in these duties by the charge nurses and the issue here is whether that direction amounts to supervision as that term is defined by the Act.

The charge nurses, treatment nurses, whether RNs or LPNs, and CNAs are all hourly paid. The LPNs are more highly paid than the CNAs. All wear basically white or pastel clothing; the female CNAs wear blue smocks over their clothes; and the LPNs do not.

2. The statute

Section 2(11) of the Act defines a ''supervisor'' as:

> [A]ny individual having authority, *in the interest of the employer*, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not merely of a routine or clerical nature, but requires the use of independent judgment. [Emphasis added.]

As the Board and the courts have noted in numerous cases, including *Phelps Community Medical Center*, 295 NLRB 486, 489, (1989):

> The types of supervisory authority are listed in the disjunctive and authority with regard to any one is sufficient to confer supervisory status. *Ohio Power Co. v. NLRB*, 176 F.2d 385 (6th Cir. 1949), cert. denied 338 U.S. 899 (1950). However, the exercise of authority must be in conjunction with independent judgment *in the employer's interest*. *NLRB v. City Yellow Cab Co.*, 344 F.2d 575 (6th Cir. 1965). [Emphasis added.]

3. ''In the Employer's Interest''

Prior to the Supreme Court's decision in *NLRB v. Health Care & Retirement Corp. of America*, 114 S.Ct. 1778 (1994) (*Health Care*), the Board had distinguished between direction given by a skilled health care professional (such as a registered nurse) or quasi-professional (such as a licensed practical nurse) to a lesser skilled employee which was given ''in the employer's interest'' from that which was given ''primarily in connection with patient care.'' Where the Board determined that otherwise supervisory functions were exercised by such health care personnel, but primarily in the connection with patient care, i.e., as a function of that individual's professional responsibility, it found that individual to be an employee under the Act's protections and not a supervisor. As I had noted in my original decision under section II,C,2.:

> In determining whether, in the context of a health care institution, a more skilled employee's direction of one who is less skilled is a supervisor acting ''in the employer's interest,'' the Board looks to see whether that direction is routine *and* whether ''it is primarily in connection with patient care, and not in the interest of the employer.'' *Phelps Community Medical Center*, supra, at 490, quoting from *Beverly Manor Convalescent Center v. NLRB*, 727 F.2d 591, 593 (6th Cir. 1984). [Fn. omitted.]

The only issue before the Court in *Health Care* was how the statutory phrase ''in the interest of the employer'' should be interpreted. The Court rejected the Board's interpretation and held that the Board's test was inconsistent with the statutory language and Supreme Court precedent. It stated, 114 S.Ct. at 1783:

> the language [of the Statute] cannot support the Board's argument that supervision of the care of patients is not in the interest of the employer. The welfare of the patient, after all, is no less the object and concern of the employer than it is of the nurses.

The question of whether the staff nurses in issue in that case otherwise exercised any one of the statutory prerogatives establishing supervisory status was not before the Court in *Health Care*. Accordingly, the judgment of the court of appeals,[1] finding them to be supervisors, was upheld. The Court did not reach any conclusion with respect to whether charge or staff nurses, generally, were supervisors. It stated:

> An examination of the professionals duties (or in this case the duties of the four non-professional nurses) to determine whether one or more of the 12 listed activities is performed in a manner that makes the employee a supervisor is, of course, part of the Board's routine and proper adjudicative function. In cases involving nurses, that inquiry no doubt could lead the Board to conclude in some cases that supervisory status has not been demonstrated. [114 S.Ct. at 1785.]

The Court, supra at 1783, reiterated the statutory standard, stating that, ''[u]nder § 2(11), an employee who in the course of employment uses independent judgment to engage in one of the 12 listed activities, including responsible direction of other employees, is a supervisor.'' My initial decision had been grounded on this standard; it did not rest on the question of whose interest was being effectuated by the exercise of authority. Thus, as I had concluded under section II,C,2:

> I am compelled to conclude that the LPNs role in assigning and directing the work of the CNAs falls short of establishing that they responsibly direct the work of those aides with the exercise of independent judgment, whether that direction is considered to be in the employer's interest or that of the patients.

In the interest of completeness, I shall reiterate and, where necessary, expand on, the analysis which lead me to that conclusion.

In the instant case, there is no evidence that the charge nurses hire, lay off, recall, or promote other employees. At issue is whether they possess any of the other attributes of supervisory status. A determination that one is a supervisor under the Act removes that individual from under the ambit of the Act's protections; for that reason, the Board places the burden of proof of supervisory status upon the party alleging that such status exists. *Health Care Corp.*, 306 NLRB 63 (1992), revd. on other grounds *Health Care*, supra.[2] See also

[1] 987 F.2d 1256 (6th Cir. 1993). The circuit court, holding that the burden of establishing, by substantial evidence, that the staff nurses were not supervisors rested on the General Counsel, and finding both that that burden had not been met and that substantial evidence supported the employer's claim that they were supervisors, rejected the Board's conclusion that those nurses did not assign or responsibly direct other employees through the exercise of independent judgment. Id. at 1260–1261. The Supreme Court noted that those staff nurses ''have responsibility to ensure adequate staffing; to make daily work assignments; to monitor the aides' work to ensure proper performance; to counsel and discipline aides; to resolve aides' problems and grievances; and to report to management.'' *Health Care*, supra at 1781.

[2] Although the court of appeals (*NLRB v. Health Care & Retirement Corp. of America*, 987 F.2d 1256 (6th Cir. 1993)) had rejected the Board's allocation of the burden of proof, that issue was not presented to the Supreme Court. As I noted in my initial decision, I am duty bound to ''apply established Board precedent which the Supreme Court has not reversed. *Waco, Inc.*, 273 NLRB 746, 749 (1984); *Iowa Beef Packers*, 144 NLRB 615, 616 (1963).'' However, neither my initial decision nor this supplemental one are grounded on the failure of one party or the other to sustain an initial burden of proof. Were I to phrase my resolution of this issue in terms of the burdens of proof, I would conclude that the General Counsel has sustained his burden of proving, by a preponderance of the evidence, that the charge nurses did not direct the CNAs through the use of independent judgment, that Respondent failed to rebut that evidence and that, on the record as a whole, I found that the charge nurses

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Hydro Conduit Corp., 254 NLRB 433, 437 (1981). As was quoted there:

> [T]he Board has the duty to employees to be alert not to construe supervisory status too broadly because the employee who is deemed a supervisor is denied employee rights which the Act is intended to protect.

Westinghouse Electric Corp. v. NLRB, 424 F.2d 1151, 1158 (7th Cir. 1970), cert. denied 400 U.S. 831 (1970).

I turn to a consideration of the facts and case law applicable to such factors as are alleged to be present here.

4. Responsible direction requiring the exercise of independent judgment

Much of what transpires in Respondent's facility vis-a-vis patient care is of a routine nature. As Faye McIntosh, an LPN charge nurse, described her role, ''So much is so routine, it's kind of hard to remember exactly.'' The record reflects similar vagueness, with nearly as much testimony as to what people believe the charge nurses can or cannot do than as to what they do or have done.

In general, it is clear that the charge nurses are responsible for patient care and virtually everything they do is directed to that end. While the aides know their patients and know what is required of them on a day-to-day basis, if the charge nurse sees that a patient is in need of care, such as bathing, changing of sheets or clothing, or repositioning in bed, she will tell the CNA, whose job it is to perform these functions, to take care of it. If a patient's condition changes such that some additional or different care is required, the charge nurse will so inform the CNA. If a patient has an infectious condition, the charge nurse may also direct the aide to wear a mask or double glove when in contact with that patient. If a patient has soiled the floor, the charge nurse could call housekeeping for someone to clean up. A CNA might clean it up herself or ask a porter to do it.

The charge nurses have some responsibility for seeing that the floor is covered. Respondent's written policy on the scheduling of breaks requires that aides and porters must sign out at the nurses' stations when going on their breaks and must advise their ''supervisor'' when leaving their work areas. Who that ''supervisor'' is, the policy does not say, but Shelton testified that the intended reference is to the charge nurse. In practice, the CNAs tell the charge nurse when they are taking breaks; it is unclear whether they actually sign in or out from those breaks.[3] The charge nurse may ask an aide to delay taking a break where the floor would not be properly covered or an emergency exists. Similarly, Respondent's policy on ''Leaving Premises While on Duty'' prohibits employees from leaving the home while on duty and requires that any exceptions be cleared with the ''supervisor and/or administrator.'' The aides and the charge nurses do leave the premises on their lunch hours. The aides will tell the charge nurse that they are leaving and one charge nurse will tell the other if she is going to be off the premises. If an emergency arose requiring a CNA to leave, the charge nurse would allow the aide to do so. When staffing conditions require it, the charge nurse may direct an aide to work on the other floor or with different patients.

Sometimes, urgent patient care needs preclude the charge nurse from completing her paperwork by the end of her shift. When that happens, according to Mays, she can decide to stay over, earning overtime, in order to complete it. When a CNA calls and tells the charge nurse that she will not be coming in to work a scheduled shift, the credible evidence indicates that the charge nurse, even a charge nurse hired as a temporary from a nurses' agency, can ask another aide to stay over until a replacement arrives or for an entire shift. The charge nurse will initial that employee's timecard to show that the extra hours were authorized. However, there is no evidence that a charge nurse can require that an aide remain beyond the end of her shift. It also appears that a charge nurse can call an aide to ask if that aide wants to come in for the shift. There is no set order in which the aides are to be called. If the tech ''supervisor,'' Ruby B. Jenkins (known as Miss Ruby) is present, the charge nurse may get a number from her. The up-to-date list of the aides' phone numbers is maintained at Miss Ruby's desk and, in her absence, a charge nurse may get the numbers from that source.[4] Where an aide has made a mistake in punching in or out, the charge nurse may sign the corrected timecard.

The authority and responsibilities of Respondent's LPN charge nurses are typical of the authority and responsibilities of similar employees found by the Board in numerous cases to be insufficient to establish supervisory status. Thus, in *Riverchase Health Care Center*, 304 NLRB 861 (1991), the Board found that the assignment and direction of the work of the nurses aides, following doctors' orders and standard nursing practices, as here, was routine. (It was also found to be primarily in connection with patient care.) There, the Board also found that the authority to call in replacements from a list of approved aides, request, but not require, aides to work overtime, or to transfer aides to different wings of the facility where circumstances required, to initial timecards and verify attendance when an aide neglected to punch the timeclock, or to request aides to postpone or reschedule breaks all in order to ensure adequate staff coverage, involved only the exercise of routine judgment and did not align the charge nurses with the Employer. See also *Health Care Corp*., 306 NLRB 63 (1992); *Phelps Community Medical Center*, supra, *Waverly-Cedar Falls Health Care*, 297 NLRB 390 (1989); and *Beverly Manor Convalescent Centers*, 275 NLRB 943 (1985). Indeed, as the Board noted in the latter case, at 947:

> The authority of the LPNs . . . would be insufficient in the industrial setting to render them supervisors. As in the case of leaders in manufacturing plants, the LPNs . . . have no authority to fire, hire, or effectively to

did not possess or exercise any of the statutory criteria under Sec. 2(11) of the Act.

[3] Both Mays and Walter denied that there were any sign-in sheets. CNA Wynola Mozee testified that they were ''supposed'' to sign a chart at the nurse's station and had to tell the charge nurse when they were leaving the floor. No examples of such sign-in sheets or charts were placed in evidence.

[4] Walter testified that she had never called an aide to come in to work and that she had been told by Shelton and Troxell that she had no authority to do so. It was her testimony that she had to call the scheduling supervisor, Pam Eiler, to secure a replacement aide and that she had done so as late as 11 p.m. to report that an agency nurse had failed to show up. I would conclude that there was no fixed practice established on this record.

> recommend such actions; they do not grant vacations or leave time. At most, they give general direction, train employees, and seek to maintain product quality control. [Citations omitted.]

Comparison of the charge nurses to foreman and leadpersons in industrial settings is instructive. In *Hydro Conduit Corp*., supra, the foreman possessed authority similar to these charge nurses. Like the charge nurses, he had no role in the hiring and initial assignment process. His ''input'' and evaluations with respect to probationary employees and those under consideration for promotion or transfer were solicited, but he was not called on to make recommendations. There was no evidence that any recommendations he happened to make were followed and, as here, it was clear that the supervisors made independent evaluations of those employees. The same pertained to discipline; the foreman reported infractions and low productivity, providing input to the disciplinary process but made no recommendations. Such verbal reprimands as he was empowered to issue did not impact on the job status of those reprimanded. Also like the charge nurses, the foreman could reassign employees for brief periods of time to meet the exigencies of production and could request employees to work overtime where the supervisor had determined that overtime was required. He could authorize employees to leave work where that employee's health required it or where an employee was required to appear in court; such requests were granted automatically, as they are in Respondent's facility. In *Hydro Conduit*, supra, the administrative law judge concluded and the Board agreed that the evidence failed to establish that the foreman exercised independent judgment in performing any of the statutory functions.

Moreover, the authority to work overtime, under clearly defined circumstances, without getting the approval of her own supervisor, does not indicate that the charge nurse possesses any supervisory authority over other employees. Even if the decision to work overtime involves the exercise of independent judgment, no different conclusion would be warranted as ''the decisive question is whether [the employee] has been found to possess authority to use independent judgment with respect to the exercise . . . of some one or more of the specific authorities listed in Section 2(11) of the Act.'' *Chicago Metallic Corp*., 273 NLRB 1677, 1689 (1985), quoting from *Advanced Mining Group*, 260 NLRB 386 (1982), and *NLRB v. Brown & Sharpe Mfg. Co*., 169 F.2d 331 (1st Cir. 1948). The same rationale would pertain to the nurses' unquestioned exercise of independent judgment in the application of their superior skills and training in their own treatment of patients. It would not show that they were supervisors unless it involved application one of the specific criteria of Section 2(11) to other employees. Thus, it is irrelevant to the issue of supervisory status that a charge nurse may exercise independent judgment when deciding that a doctor should be called, a patient be sent to a hospital, or the police be called to investigate a possible unlawful entry into the facility.

Based on the foregoing, I am compelled to conclude that the LPNs' role in assigning and directing the work of the CNAs falls short of establishing that they responsibly direct the work of those aides with the exercise of independent judgment. Clearly, no independent judgment is required to determine that a patient's clothing or bed linens are wet and in need of changing or that a patient should be turned in the bed pursuant to a posted schedule. No independent judgment is involved in the instruction to an aide to don a mask, or double glove, to avoid contagion from a patient diagnosed to have a contagious disease. This is the kind of direction which comprises most of the charge nurses' role with respect to the aides. It is also the kind of direction which is akin to that given by a more skilled craftsperson to one of lesser skill, or by a fully qualified worker to her helper. It derives from the higher levels of skill and is not necessarily indicative of supervisory authority. *Adco Electric*, supra at 1120; *NLRB v. Southern Bleachery*, 257 F.2d, 235, 239 (4th Cir. 1958); *Chicago Metallic Corp*., 273 NLRB 1677, 1689 (1985); and *United States Gypsum Co*., 118 NLRB 20, 30 (1957).

5. Authority to reward, promote, discipline, or discharge aides

The authority of the charge nurses to reward, promote, discipline, or discharge the CNAs is limited. The CNAs are evaluated at the conclusion of their probationary periods and annually thereafter. Those evaluations are conducted by Dillhoff and Shelton. Respondent's written policies give no role to the charge nurses in that evaluation procedure. Shelton claimed that she sometimes sought input about a CNA from either the charge nurse or from other employees; her evaluation *might* change based on a charge nurse's evaluation, she stated.

Mays testified that, while she is not required to do so, she might tell either Troxell or Dillhoff if she felt that a CNA was doing a particularly good job. If that aide was not performing properly, Mays said, she would ask the aide if she was having a problem that day. Mays has not had a situation where an aide continually failed to do her job. If such a situation arose, she would report it to Miss Ruby, Mays said. If this failed to achieve the necessary improvement, she would then talk to the director of nursing.

There are instances when a charge nurse will report or write up an aide. All instances of patient abuse are reported by anyone who observes them, as required by state law and the Employer's policy. The record also contains some examples of written employee counseling or disciplinary reports.

Thus, on April 17, 1988, LPN M. Williams issued a written warning to an aide for failing to obey orders respecting the use of the telephone. On March 23, 1991, LPN Hollingsworth issued a written warning to an aide who refused her order to clean a bedside commode. On October 11, 1991, an RN charge nurse wrote an employee counseling form on an aide who had failed to follow her instructions and had been ''disrespectful . . . with charge nurse'' by arguing with her over what work she was supposed to do. That counseling form stated that the nurse had told the aide to clock out and leave the facility. The employee ignored this order and the nurse had to secure the assistance of Miss Ruby to enforce it. The record does not reflect what, if any, further discipline was assigned for this conduct, which was insubordination if the charge nurse is the CNA's supervisor.[5] On March 10,

[5] Whether or not Respondent bears the burden of proof on the supervisory issue, the failure to bring forth relevant evidence which

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1992, RN Kathy Skidmore issued a counseling form to an aide for excessively watching TV and failing to attend to his duties. A plan of action, instructing the employee to watch TV only on his breaks and to follow the routine listed on the schedule, was written out on an informal notepad and signed by the employee. That same employee and another aide were issued counseling forms or verbal warnings by LPN Valerie Evans on October 13, 1992, for interfering with each other's work. Those writeups resulted in Shelton discussing the problem with the employees and issuing them written warnings. Similarly, on December 4, 1992, Shelton counseled an aide about his work performance after two charge nurses, Faye McIntosh and Lynn Troxell, reported that he was failing to attend to his scheduled duties.[6]

Other than as described above, the record does not reflect what effect the charge nurses' counseling forms or warnings had on the wages, tenure, or other conditions of the aides' employment. Shelton testified that she is the one who issues employee discipline, although she claimed in general terms that a charge nurse could do so as well.

In several instances, employees impaired by substance abuse have been sent home by a charge nurse. In one instance, Mays observed an aide in an apparent state of intoxication. She reported it to Fette, Fette spoke with the employee and told him that it would be better if he went home. Fette then drove him home. In another instance, an aide sent home for the day for the same reason by Charge Nurse Ruby A. Jenkins was apparently not given any further discipline.

Nothing in any of the above rises to the level required to establish supervisory status. The charge nurses have no greater role in the evaluation of the aides than does any other employee, including other aides. They may be asked about an aide's performance but are not given any express role in the evaluation process. In several recent cases where the charge nurses had significantly greater roles with respect to evaluations, the Board nonetheless found supervisory status to be absent. In *Phelps Community Medical Center*, supra, the director of nursing delegated some of the evaluations of day shift aides to the LPNs and had the evening and night-shift LPNs fill out evaluations on the aides who worked with them. Those evaluations rated the aides in various aspects of their performance and, in some cases, indicated whether the LPN recommended continued employment. The Board, noting that, as here, there was no evidence as to the weight or effect of such recommendations and evaluations, held that their role in those evaluations did not establish that they possessed or exercised supervisory authority. It noted that ''[t]he authority simply to evaluate employees without more is insufficient to find supervisory status,'' citing *Passavant Health Center*, 284 NLRB 887, 891 (1987), and *Geriatrics, Inc.*, 239 NLRB 287 (1978). See also *Waverly-Cedar Falls Health Care*, supra, and *Ohio Masonic Home*, supra, where the LPNs evaluated both probationary and nonprobationary employees, assessing their performance on a number of job-related categories. Those evaluations, however, did not recommend any personnel action and there was no showing that any employee's job status had been affected by such an evaluation. The same result applies in the industrial setting from such limited authority to evaluate employees, where those evaluations do not constitute effective recommendations for promotions, wage increases, or discipline. *Somerset Welding & Steel*, 291 NLRB 913, 914 (1988).

Similarly, the role of the charge nurses in issuing verbal and written warnings or counseling forms, which go into an employee's personnel file but do not independently result in any adverse action, does not evidence supervisory status. In *Ohio Masonic Home*, supra, the authority of the charge nurses to issue warnings was similar to the authority of Respondent's charge nurses, as was the effect of those warnings. The Board stated that ''[t]he mere authority to issue verbal reprimands of the kind involved here is too minor a disciplinary function to constitute supervisory authority . . . . Likewise, the mere factual reporting of oral reprimands and the issuing of written warnings that do not automatically affect job status or tenure do not constitute supervisory authority.''

In both *Ohio Masonic Home* and *Phelps*, the charge nurses had limited authority to clock an aide out when that aide's continued presence posed a danger to the patients either because of his or her refusal to obey patient care instructions or because of substance abuse related impairment. In both cases, the Board held that the limited exercise of such authority, particularly when it is limited to ''flagrant violation[s] of common working conditions, such as being drunk, is insufficient by itself to establish supervisory status.'' The authority of Respondent's charge nurses to send an aide home was no greater than that of the LPNs in the cited cases. Moreover, the evidence indicates that such authority was not always exercised independently and without reference to higher authority.

Walter has rewarded the CNAs on her floor and shift by buying pizza for everyone, at her own expense. As Respondent correctly noted in its supplemental brief, I accord her personal generosity no weight in determining supervisory status. Such thoughtful gestures, common in offices, plants, and other work settings between higher level workers and those who function as support staff, neither required, suggested, nor underwritten by the Employer, can hardly be said to be a reward ''in the interest of the employer.''

6. Other factors

As noted above, the charge nurses wear somewhat different clothing from the CNAs. They are more highly paid although all are paid on an hourly basis.

The charge nurse job description places the responsibility for the nursing care of all patients on an assigned unit on the charge nurse. It also provides that the charge nurse is ''[r]esponsible for supervision of all nursing personnel . . . checking that their jobs are done.'' It further provides that the charge nurse ''[a]ttempts to solve minor employee problems, refers problems with nursing technicians [CNAs] to their immediate supervisor first, and to the Director of Nursing if necessary.'' Under that job description, the ''primary

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one would possess if it exists warrants that an adverse inference be drawn to the effect that no such evidence does exist. *J. Huizinga Cartage Co.*, 298 NLRB 965, 970 (1990).

[6] The record also contains warnings or records of counseling signed by Troxell, who was the nursing systems manager and an admitted supervisor, in addition to being an LPN, and by Shelton, who was an LPN and director of nursing administration. One counseling form, dated August 10, 1992, issued by Troxell, was signed by Miss Ruby, as ''tech sup.'' after the director of nursing spoke with the aide and established a routine whereby Miss Ruby would give her instructions on the importance of making her rounds.

charge nurse'' is in charge of the facility in the absence of the director of nursing and acts ''as supervisor of all LPNs in patient care emergency situations.'' Walter credibly testified that she had never heard of the title ''primary charge nurse.'' Respondent's policies do not define who is the ''primary charge nurse'' and that does not appear to be a designation in actual usage in the nursing home. In at least one instance, Mays called the police when there was a suspected break-in. There was no evidence of grievance adjustment by the charge nurses other than possibly separating two aides who might be experiencing difficulties working together.

The managerial hierarchy is present at the nursing home during the first shift, with some of them coming in before that shift begins or staying several hours into the second shift. For most of the hours of the second and third shifts, the most senior persons present at the facility are the charge nurses. However, an RN, either the director of nursing or another, is either on duty or on call at all times.[7]

There is nothing in these additional factors which warrants a contrary conclusion with respect to the supervisory status of the charge nurses. Neither a distinction in their dress nor a higher rate of pay necessarily indicates supervisory status. That someone may have the title of supervisor, or have theoretical authority which is not actually exercised, is insufficient to establish that one is a statutory supervisor. *Adco Electric*, 307 NLRB 1113, 1120 (1992), and cases cited there. See also *Federal Compress & Warehouse Co. v. NLRB*, 398 F.2d 631, 634 (6th Cir. 1968).

The fact that the charge nurses are the highest ranking individuals on site during most of the second and third shifts is some indication as to the likelihood of supervisory status. It is negated, however, by the fact that Respondent's policy manuals give detailed instructions covering most situations. Moreover, during those primarily quiet hours, admitted supervisors are on call and immediately available by telephone. *Waverly-Cedar Falls Health Care*, supra, and *Phelps Community Medical Center*, supra. It cannot support a finding of such status where the statutory indicia are lacking. As the Board has recently stated: ''[T]he Act does not state or fairly imply that the highest ranking employee on a shift is necessarily a supervisor.'' *Northcrest Nursing Home*, 313 NLRB 491, 499 (1993).

In agreeing to the terms of an election among Respondent's employees, the Union acceded to the Employer's position and excluded the LPNs from the bargaining unit. This agreement does not give the charge nurses attributes of supervisory status which they do not otherwise possess and is entitled to little weight.

C. *Conclusion*[8]

Having fully reconsidered the matter in light of *Health Care* and the entire record, including the supplemental briefs filed by Respondent and the General Counsel, I must adhere to my original conclusion that Respondent's charge nurses are employees, lacking any of the attributes of Section 2(11) of the Act. In particular, I find that they do not exercise independent judgment in responsibly directing the work of the CNAs. Having reached the same conclusion on remand with respect to this supervisory issue, no change in my initial findings of fact and conclusions of law with respect to the other issues is warranted or required. I adhere to those findings of fact and conclusions of law and incorporate them by reference in this supplemental decision.

[7] Contrary to the assertion in Respondent's supplemental brief, it is immaterial that it is state law which requires that a registered nurse be on duty or on call at all times. The issue is not why an RN is available to the charge nurses but whether, in fact, one is.

[8] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.